

In paragraph 53, the Commission asks whether, "with respect to services that are neither clearly encompassed by the statutory definition for 'electronic publishing' nor specifically listed in the delineated exceptions to that definition", it should "classify as 'electronic publishing' services those services for which the carrier controls, or has financial interest in, the content to the information transmitted by the service". This proposed interpretation of section 274 amounts to saying that a service becomes electronic publishing merely because the carrier controls or has a financial interest in the content of the information transmitted by the service. There is no basis in the Act for this interpretation.

A service cannot be electronic publishing unless it fits within the definition of the term and is not encompassed by the exceptions to that definition. In other words, to be electronic publishing, the service must be, or be like, one of the seven enumerated categories of section 274(h)(1) (e.g., "news", "entertainment", etc.), and it must also not fall within one of the 14 exceptions to those categories set forth in section 274(h)(2) (e.g., "information access", "gateways"⁸², etc.). To illustrate this point, a service which transmits "news" as part of a "gateway" offering is not an electronic publishing service since it falls within an exemption contained in section 274(h)(2). Obviously, the owner of the gateway, by virtue of its ownership, has "control" over which information services are provided through its gateway, and, assuming it does not provide the gateway service for free, it has a "financial interest" in the content provided through the gateway. Despite this control and financial interest, the gateway

⁸² As explained by the Department of Justice, an "information gateway service permits users of an on line service to obtain access to information supplied by other providers." *United States v. Western Elec. Co.*, No. 82-0192 (D.D.C.), Memorandum of the United States in Support of the Motion of the Bell Companies for a Waiver to Permit them to Provide Information Services Across LATA Boundaries, at 3 n.7 (May 8, 1995).

service is not subject to requirements of section 274 because it falls within an exemption to the "in general" definition. The existence of the elements of "control" and "financial interest" are simply not determinative of whether a service is electronic publishing.

Customer Name and Address Service, discussed earlier, is another example of a situation where the BOC controls the content of, and has a financial interest in, the information transmitted by the service but the service is not electronic publishing because it does not fall within the enumerated categories set forth in section 274(h)(1). Again, the "control or financial interest" test does not fit the language of the statute.

The Commission cites the MFJ's definition of electronic publishing which contains language stating that it includes information in which the provider has "a direct or indirect financial or proprietary interest". This definition has no bearing on what electronic publishing means under the Act. Rather than adopting the MFJ's definition of the term, as was done in the case of "information services" and "manufacturing", the Act provides an entirely new definition. Furthermore, the MFJ's definition applied to a prohibition placed only on AT&T, not on the BOCs, and therefore is unrelated to concerns about purported local exchange bottleneck power - the basis for section 274.⁸³

Ameritech appreciates the Commission's search for a "rule-of-thumb" to distinguish electronic publishing from other information services. However,

⁸³ See Implementation of the Telecommunications Act of 1996:: Telemessaging; Electronic Publishing; and Alarm Monitoring Services, CC Docket No. 96-152, FCC 96-310, released July 18, 1996 at para. 7.

Ameritech does not believe that the "financial interest or control" test is the appropriate one. Instead, Ameritech believes a better rule-of-thumb would be a "generation or alteration of content" test. Under this test, if the information transmitted falls within one of the categories listed in section 274(h)(1), the service is electronic publishing unless the BOC did not generate or alter the content of the information supplied. This rule-of-thumb would be consistent with the structure of the Act and would capture most, if not all, of the exceptions set out in section 274(h)(2).

VII. ENFORCEMENT OF SECTIONS 271 AND 272

In section VII of the Notice, the Commission seeks comment on, inter alia, the types of showing that should be required of a complainant and defendant BOC in order to ensure a full and fair resolution of a complaint alleging that a BOC has ceased to meet the conditions required for approval to provide in-region interLATA services. The Commission also asks for comment on the elements of a prima facie case and whether the burden of proof should shift to a defendant BOC in the event a prima facie case is established by complainant. Ameritech addresses these issues below.

In paragraphs 99 and 100 of the Notice, the Commission asks for comment on the elements of a claim alleging a violation of section 271(c)(1). Ameritech submits that the only way this provision could be violated would be if a BOC either withdrew the section 271(c)(1)(B) statement on which its application was premised and approved, or revised such statement so that it no longer complied with the competitive checklist, or failed to implement or provide provisions in the statement.

Section 271(c)(1)(A) imposes no ongoing obligation on a BOC. Instead, it describes conditions that must exist at the time of a BOC's long-distance application in order for that application to be approved. While parties are certainly free to oppose an application on section 271(c)(1)(A) grounds, once the application is approved, that provision provides no further basis for any complaint.

Likewise, Ameritech sees no basis for a section 271(c)(2)(A) complaint. Like section 271(c)(1)(A), section 271(c)(2)(A) establishes one-time conditions that must exist at the time a BOC's application for in-region interLATA authority is approved. If those conditions subsequently change -- for example, if a local exchange carrier that has an interconnection agreement with a BOC ceases to do business in the state in which the BOC is operating -- that does not constitute a violation of section 271(c)(2)(A) by the BOC. Thus the only conceivable violation of section 271(c)(2) that could form the basis of a section 271(d)(6) complaint would be if the BOC ceases to offer access or interconnection in accordance with the requirements of 271(c)(2)(B).

Ameritech believes that it would not be productive to attempt to prescribe in detail the elements of every possible claim that might be brought under section 271(d)(6). The Commission has just prescribed 72 pages of rules (accompanied by 700 pages of discussion) implementing section 251. A complaint might allege a violation of any one of those rules. Attempting to prescribe the elements of every claim that conceivably could be brought would be a monumental undertaking that would not seem practicable at this point.

Ameritech strongly opposes the Commission's proposal to shift the burden of proof to the BOCs in all section 271(d)(6) proceedings after a prima facie case is made. That proposal is unnecessary, grossly unfair to the BOCs and arguably unconstitutional. It would also generate a host of frivolous complaints, particularly if, as the Commission proposes, the Commission combined this shift in the burden of proof with a relaxed prima facie case standard.

As an initial matter, Ameritech submits that there is no need for these proposals. Any complainant alleging a section 271 violation will have two procedural options at its disposal. One option would be to file a section 271(d)(6) complaint and secure a decision within 90 days. Another would be to proceed under section 208, in which case the Commission must issue a decision within five months. If a complainant does not have the information needed to document its claim, it is appropriate that the complainant proceed under section 208, which would give it time to pursue discovery, without excessively delaying resolution of its case. If, as the Commission suggests, some parties believe that the Commission's discovery processes are too cumbersome, then the Commission should reform those processes. The Commission has offered no reason why it should simply give up on discovery altogether. Indeed, the Commission has not even indicated what the alleged deficiencies in the discovery process are, much less offered a basis for concluding that they are beyond remedy.

There are countless situations in civil litigation in which information relevant to resolution of the issues is uniquely in the hands of defendants. In products liability cases, for example, plaintiffs are not likely to have information concerning the design, manufacturing, or distribution processes needed to prove negligence. In our system of jurisprudence, we do not, however, shift the burden

of proving a lack of negligence to defendants; we rely on discovery to address any informational asymmetry.

In the case of section 271(d)(6) claims, any informational asymmetry is bound to be far less pronounced. First, complainants are not likely to be private citizens, but other telecommunications carriers. As such, they are likely to have the experience, resources, and technical and operational knowledge to identify violations of section 271(d)(3) and to prosecute them with the Commission.

Second, the 1996 Act requires that much of the information that might be relevant to a complaint be made publicly available. For example, section 252(a) requires BOCs to file all interconnection agreements, including those negotiated before the date of enactment of the 1996 Act, with the relevant state commission for approval, and section 252(h) requires the states to make those agreements publicly available.⁸⁴ Thus, the terms on which each BOC offers interconnection to each telecommunications carrier will be on the public record, permitting scrutiny not only of a particular BOC's offerings but benchmarking of those offerings with those of other BOCs. Moreover, section 272(d) requires the BOCs to obtain a joint federal/state audit every two years by an independent auditor of the company's compliance with the accounting, structural separation, and nondiscrimination requirements of section 272. The results of each audit must be submitted to the Commission and the relevant state commission and made publicly available, and the auditor and both commissions are given broad authority to access company records in connection with these audits. Given the availability of this information, the Commission's assumption that the BOCs will

⁸⁴ Interconnection Order at paras. 165-171.

be in unique possession of information necessary to the resolution of section 271(d)(6) complaints is unfounded.

Third, the complainant in a section 271(d)(6) has much more time than a respondent to gather evidence and prepare its case. Since the 90-day clock does not begin running until the complainant files its complaint, the complainant can take as much time as it needs to document its claim. In contrast, once the complaint is filed, time constraints become critical, and respondents will have precious little time to assemble evidence in support of their defense. Shifting to them the burden of proving their innocence would only compound their difficulties.

Indeed, placing the burden of proof on the BOCs in section 271(d)(6) cases would create perverse incentives. Complainants would have strong incentives to file all complaints under section 271(d)(6), even if those complaints involved thorny issues and complex fact patterns that could not be fleshed out in the 90-day time frame. Conversely, if complainant bears the burden of proof, it will use the expedited procedures when the case is straightforward and the facts are not in dispute, and rely, instead, on section 208, if that is not the case. This, Ameritech submits, is as it should be.

The Commission correctly points out in the Notice that a shifting of the burden of proof after a prima facie showing would not be wholly unprecedented. In cases of discrimination, it notes, once the complainant has shown that discrimination has occurred, the burden shifts to the respondent to show that the discrimination was reasonable. This is true, however, because of the general presumption against discrimination of any kind and the fact that only the

respondent is in a position to explain the basis for its discrimination.⁸⁵ A claim that discrimination is reasonable, and therefore not unlawful, is thus properly treated as an affirmative defense.

Here, in contrast, the Commission does not purport to carve out discrete elements of a claim that are uniquely within the province of respondents and that are properly treated as affirmative defenses. Its proposal would employ a sledge hammer, not a chisel, shifting to the BOCs the burden of proof with respect to all issues in all claims alleging a violation of section 271(d)(3) to the BOCs. The proposal is thus overbroad.

Indeed, the proposal is not only overbroad but also, simultaneously, too narrow. For example, under the Commission's proposal, if AT&T brought a claim against a BOC for not making available a service for resale, the Commission would place the burden of proof on the BOC. But if a BOC brought what is substantively the identical claim -- that AT&T did not make one of its offerings available for resale -- the burden would not be on AT&T, but would remain on the BOC. Moreover, if AT&T brought the same claim against an independent LEC, AT&T would bear the burden of proof. Thus, the Commission's allocation of the burden of proof would depend, not on the nature of the claim, but on the nature of the party -- which is surely an impermissible basis for allocation.

The Commission's proposal to shift the burden of proof to the BOCs in all section 271(d)(6) complaints would be particularly unfair if the Commission

⁸⁵ Discrimination could be based on cost considerations, competitive circumstances, or issues of technical feasibility. Only the defendant is in a position to explain these matters.

viewed generalized allegations as sufficient to establish a prima facie case. Responding and preparing evidence to rebut a specific complaint in a 90-day complaint cycle is difficult enough. Responding to allegations that were not described in detail would be even more difficult.

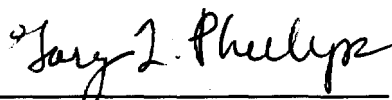
Moreover, the Commission's proposal would encourage the filing of frivolous complaints, if for no other reason than to conduct a fishing expedition. Even if a BOC competitor had no evidence, or only the slightest suspicion, that a 271(d)(3) violation had occurred, it would have strong incentives to proceed with a complaint. At a minimum, it could abuse the complaint process to conduct wide-reaching discovery. At worst, it could impose significant administrative burdens on the BOCs to which it would not be subject itself. At a time when the trend in jurisprudence is to discourage frivolous litigation, this proposal is wholly inappropriate.

In sum, the Commission's proposals to shift the burden of proof and relax the prima facie case standard in section 271(d)(6) cases are unnecessary and unfair. They are based on an exaggerated perception of informational asymmetries, and they impermissibly allocate the burden of proof based on the

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identify of the respondent rather than the nature of the claim. They would also invite a raft of fishing expeditions, placing excessive burdens on the BOCs and the Commission. The proposals are ill-conceived and should be rejected.

Respectfully submitted,



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